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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

TIMOTHY R. BELL, an individual; and JENNIFER BELL, an individual, Plaintiffs, v. COUNTRYWIDE BANK, N.A., d/b/a BANK OF AMERICA CORPORATION, a Delaware corporation; BAC HOME LOANS SERVICING, LP, a Texas limited partnership; RECONTRUST COMPANY, N.A., a national association; and DOES 1-5, Defendants.	**MEMORANDUM IN SUPPORT OF STATE OF UTAH'S MOTION TO INTERVENE** Case No. 2:11-cv-00271-BSJ Judge Bruce S. Jenkins

The State of Utah submits this Memorandum in Support of its Motion to Intervene in the above captioned matter.

INTRODUCTION

In a Memorandum Opinion by this Court in 2007, the constitutionality of Utah Code Ann. § 57-1-21(1), which limited trustees of trust deeds exercising a "power of sale" to attorneys who maintained a "place" in the State of Utah, was upheld. *Kleinsmith v. Shurtleff*, 2007 WL 541808 (D. Utah). This decision was subsequently upheld by the Tenth Circuit in *Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10th Cir. 2009), in which the Court said: "Making it easier for Utahns to meet with trustees, who play a pivotal role in non-judicial foreclosures, is a legitimate state interest." *Id.* at 1048.

It is this "legitimate state interest" that drives the State's Motion to Intervene in this case. Utah takes very seriously how foreclosure actions are to be conducted in the State. Utah – along with every other state in the nation – has set laws as to how this procedure is to be conducted, as well as who is to conduct it. Some states require the trustee to have a physical place of business in the state. Others restrict who the trustee may be. Utah restricts trustees with a "power of sale" to attorneys and title companies with a place of business in the State. The purpose of this statute is to rein in the ruthlessness of the "foreclosure mills" and provide the homeowner with an opportunity to meet with the trustee face-to-face in an attempt to save their home.

Recently, however, two judges in this district have held that ReconTrust – with no office in the State – can conduct real estate foreclosures in Utah in complete derogation of Utah's trustee qualification statute. *Garrett v. ReconTrust Company, N.A.*, 2:11-cv-00763 DS, slip op. (D.Utah Dec. 21, 2011); *Dutcher v. Matheson*, 2:11-cv-666 TS, slip op. (D.Utah Feb. 8, 2012). It makes no sense, as these two recent cases have held, to say that when ReconTrust is conducting real estate foreclosures in Utah it is acting in a fiduciary capacity in Texas. As this Court said: "Texas does not pass Utah banking laws. Utah does not pass Texas banking laws."

Because of these two recent decisions, and the Utah Attorney General's prior dealings with Bank of America regarding ReconTrust,[1] the State has begun intervening in cases in this Court dealing with the ReconTrust issue. It has filed motions to intervene in both *Garrett* and *Dutcher,* and last week the State filed a Motion to Intervene in *Lawrence v. ReconTrust*, 1:08-cv-66, a case not yet decided, but one in which Judge Benson has asked the parties for further briefing.

Given this judicial climate, the State seeks to intervene in this case for the purpose of having its voice heard when this case is appealed to the Tenth Circuit.

DISCUSSION

The State of Utah wants to see this Court's Memorandum Opinion and Order, dated March 15, 2012, affirmed. This Opinion is in complete accord with the way the State of Utah views § 92a of the National Bank Act ("NBA"). 12 U.S.C. § 92a. While it may be a little unusual to be making a Motion to Intervene to support a District Court's decision on appeal, given that two judges in this district have held that Texas law governs trustees conducting foreclosures in Utah, the State deems it necessary to intervene to protect the integrity of its statutes and the application of those statutes to activities conducted inside the State of Utah.

This issue is too critical to the State to just sit idly by and hope things out well.

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[1] In May, 2011, the Utah Attorney General sent a letter to the president of the Bank of America indicating that the State of Utah was prepared to file suit against ReconTrust if it continued to conduct foreclosures in the State of Utah. Four attorneys from the Bank of America were dispatched to meet with the Utah Attorney General in June, 2011. Bank of America's proposal was that they would cease ReconTrust's operation in the State if the State would agree to not bring suit against Bank of America and ReconTrust. The Utah Attorney General agreed to that proposal, and ReconTrust ceased operations in the State shortly thereafter.

Dispossessing people of their homes is a traumatic and disruptive experience for any family, as well as the community at large. Utah laws governing this situation are in there for a reason, and the State intends to enforce its laws dealing with foreclosure. Individual homeowners do not have the wherewith all to take on Bank of America – and while the State compliments Plaintiffs' counsel for their excellent work in this case, the fact of the matter is their clients' interest are not identical with the State's interest in upholding the validity of the Utah statute and protecting the public interest.

A. Rule 24(a).

Rule 24(a) of the Federal Rules of Civil Procedure provides that a court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to . . . the subject of the action.

Section 2403(b) of 28 U.S.C. provides for a State to intervene in a case wherein the constitutionality of a statute of that State affecting the public interest is drawn into question. In the present case, ReconTrust asserts that because of the supremacy clause of the U.S. Constitution, Utah law is unconstitutional as applied to national banks. Technically speaking, while ReconTrust does not specifically allege the Utah trustee qualifications statute is unconstitutional – its argument has that effect. Because ReconTrust is claiming that the Utah statute is preempted by the laws of the State of Texas, it is essentially arguing that the Utah law is unconstitutional as applied to national banks acting in the State.

The State of Utah acknowledges that that the National Bank Act preempts State law. But § 92a of the NBA has a State law condition which provides that the laws of the State in which the bank acts governs its fiduciary activities in that State. 12 U.S.C. § 92a(a) and (b).

Thus, when conducting real estate foreclosures in the State of Utah, ReconTrust is subject to Utah Code §§ 57-1-21 and 57-1-23. ReconTrust claims otherwise. As a result, under the provisions of 28 U.S.C. § 2403(b) the State should be permitted "to intervene for presentation of evidence . . . and for argument on the question of constitutionality."

B. Post-Judgment Intervention.

Although the present litigation is in its post-judgment phase, the State's Motion is still timely in light of the circumstances. First, the State was never notified of the litigation by the parties even though the constitutionality of Utah statute was drawn into question. And although this Court's ruling is favorable to the State, the State's interest is not adequately represented by the Plaintiff on appeal because the State has an interest in seeking to represent the public interests by upholding the validity of the statute, wherein Plaintiffs' interests are more narrowly focused. Intervention in this case should be by right, not permissive, because the State claims an interest which, as a practical matter, may be impaired or impeded by the disposition of the pending action, and that interest is not adequately represented by the existing parties. *See*, Rule 24(a).

In determining the timeliness of a motion to intervene, the Tenth Circuit has said:

> The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.

Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1250 (10th Cir. 2001); *see also*, *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir.2010); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005).

In *United Airlines, Inc. v. McDonald*, 632 U.S. 385 (1977), the U.S. Supreme Court held that an application to intervene in a case filed after a decision was rendered by the District Court, but within the 30-day time period for an appeal, to be timely. The Court held that the critical inquiry in determining whether to permit post-judgment intervention for purpose of appeal is whether, in view of all the circumstances, the intervenor acted promptly after the entry of final judgment. *Id.* at 395-6.

The Tenth Circuit generally follows a liberal view in allowing intervention under Rule 24(a). *Nat'l Farm Lines v. ICC*, 564 F.2d 381, 384 (10th Cir. 1977). In *Elliott Industries*, *supra*, the Tenth Circuit granted intervenor's motion to intervene on appeal on the basis that the Court would be aided by the presence of an interested party like the intervenor and that no other party would adequately represent the public interest. 407 F.3d at 1104.

Likewise, given the conflicting decisions issued by this Court in the last few months, it is the belief of the Attorney General of the State of Utah that the Court would be aided by the presence of an interested party like the State to address the issue of the validity of its statutes and represent the public interest in this case.

CONCLUSION

A Motion to Intervene by the State of Utah in the above-entitled matter should be granted for the sole purpose of addressing the validity and constitutionality of Utah's trust deed trustee statute and its application to a national bank conducting fiduciary activities in the State of Utah pursuant to § 92a of the National Bank Act.

DATED this 10th day of April, 2012.

MARK L. SHURTLEFF
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing **MEMORANDUM IN SUPPORT OF STATE OF UTAH'S MOTION TO INTERVENE** was served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of:

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